

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

TYR Sport, Inc.

Opposer

V.

Marc Dushey.

Applicant

#77955633

Opposition Nos. 91197669 and 91197670

TYR SPORT INC.'s OPPOSITION TO MARC DUSHEY'S THIRD MOTION FOR AN EXTENSION OF TIME

Tyr Sport Inc. respectfully requests that the TTAB deny Marc Dushey's Motion for an Extension of Time. Tyr Sport respectfully requests that the TTAB deny Marc Dushey's motion as he has been guilty of delay and lack of diligence.

This is the *third time* Dushey has sought an extension of the discovery period. The Board already has granted Dushey an extra *120 days* of discovery. In July 2011, Dushey's former attorney requested a three month extension of the discovery period. Applicant's attorney sought this extension to accommodate Applicant's alleged need for additional time to inter alia produce documents. In December 2011, Dushey sought, Opposer did not object to, and the Board granted Dushey's thirty additional days to prepare for the discovery period.

In addition to the four months of extensions of the discovery period discussed above, Dushey has delayed these proceedings for *two more months* due to his failure to pay his lawyer. Thus, discovery has been open for over 300 days, instead of the usual 180 days permitted.



03-28-2012

Yet, despite these four months of extensions to take and complete discovery, neither Dushey nor his prior attorney has taken any affirmative action towards discovery since March 2011. Applicant still has not produced his documents. And Dushey has not taken any discovery since March 2011, over one year ago. These continuous delays are prejudicial to Opposer who is entitled to have its cases heard in a timely fashion.

FACTUAL BACKGROUND

Tyr Sport opposed Tyr Water's applications to register two marks TYR and TYR RETURN TO NATURE and Design on the grounds inter alia of likelihood of confusion. As pled in the opposition, since well prior to Tyr Water's first use, Tyr Sport has made and sold a wide variety of sports related equipment, including swimwear. Opposer also is a well-known sponsor of the highest level sports events, including Olympic swimmers and athletes. As Opposer also pled, since prior to Applicant, Opposer has continuously distributed water bottles and sports bags for carrying water, and other promotional materials at and for these events and at schools, colleges and universities. Opposer is well-known and famous in these fields. Among the consumers water distributors like Applicant have targeted, are students and athletes at colleges and universities.

On December 2, 2010, the Board sent out the initial trial order in Opposition Nos. 91197669 and 91197670 setting the discovery periods to close on August 9, 2011.

On May 2, 2011, Tyr Sport answered all of Tyr Water's discovery requests, and on June 6, 2011 produced all documents requested.

On June 17, 2012, Tyr Sport served its first set of interrogatories, production requests and admissions requests on Dushey, by hand. On July 13, 2011, Peter Vranum Esq., Dushey's lawyer contacted the undersigned, seeking an extension of time to respond to Tyr Sport's

discovery requests. Tyr Water also sought a 90 day extension of the discovery period. Tyr Water stated it needed additional time for the responses and follow-up. Tyr Sport Inc. consented to this first request.

On September 21, 2011, the parties filed a consented motion to consolidate proceedings. The Board granted this request and reset the discovery period to close November 7, 2011.

Six days later, Dushey's lawyer Peter Vranum filed a motion to withdraw as counsel as he had not been paid by his client. The Board suspended both proceedings and allowed Dushey 30 days to appoint new counsel.

On October 27, 2011, Dushey filed his motion for a second thirty day delay. Despite the number of prior delays, due to Dushey's pro se status, and the desire not to burden the Board with excessive motions, Tyr Sport did not oppose this motion.

On January 6, 2012, Dushey filed a paper indicating that he chose to represent himself in these cases. On January 13, 2012, the Board resumed the cases and reset trial dates to March 12, 2012.

On February 28, 2012, Tyr Sport took the deposition of Marc Dushey.

On March 5, 2012, Dushey filed a motion for a third extension of the discovery period seeking another 2 months' extension of the discovery periods.¹

ARGUMENT

Dushey's latest request for a third extension of discovery is simply an effort to delay the Board's resolution of these cases. Dushey does not require additional time to take discovery. Prior to his withdrawal for non-payment, Dushey's attorney obtained three additional months to take further discovery (and produce responsive documents) up to and including November 7,

¹ Both the motion and the certificate of service were unsigned. Opposer requests that the Board direct Dushey to comply with the service requirements of the rules.

2011. Despite the stated need for additional time to complete discovery, Dushey did nothing. Prior to September 2011, when his attorney withdrew, Dushey took no additional discovery. Nor did Dushey ever produce the documents responsive to Tyr Water's interrogatories.

After Dushey chose to represent himself, the Board granted Dushey *two more months* to take discovery. Again, Dushey did nothing during the extended discovery period. He was fully aware that discovery closed on March 12, 2011, but did nothing to take further discovery. This pattern of delay does not constitute good cause for yet a further extension of the discovery period.

The burden is on the moving party to persuade the Board that it was diligent in meeting its responsibilities prior to the motion's filing. *National Football League v. DNH Management LLC*, 85 USPQ2d 1852, 1854 (TTAB 2008) ("the moving party has the burden of persuading the Board that it was diligent in meeting its responsibilities; motion denied because Opposer failed to make the minimum showing necessary to establish good cause to extend discovery.

This burden cannot be met here. Despite four months of additional discovery and two months of suspensions, Dushey has failed to take any discovery since March 2011, *over a year ago*. Dushey also has failed to explain why he failed to take any discovery since March 2011 despite being granted over 120 additional days expressly to do so.

On the other hand, Tyr Sport has been cooperative in consenting to extensions, and diligent in responding to and taking discovery. In May 2011, that is *over nine months ago*, Tyr Sport responded to Dushey's entire discovery requests and in June, 2011 produced its documents. In the nine months that have transpired since, Dushey has never taken any additional discovery. Dushey has failed to explain why he or his representative failed to take additional discovery or to seek Opposer's deposition prior to the close of discovery.

The Board has consistently denied motions to extend where the record showed that moving party has been guilty of delay and lack of diligence. *Luemme, Inc. v. D. B. Plus Inc.*, 53 USPQ2d 1758, 1760-61 (TTAB 1999) (diligence not shown; discovery requests not served until last day of the discovery period); and *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848, 1851 (TTAB 2000) (applicant's motion to extend discovery denied when counsel knew of unavailability of witness a month before, yet delayed to seek an agreement on an extension of time).

As indicated above, the record shows that the need for the extension has resulted solely and completely from Dushey's own delays and lack of diligence. Discovery has been extended two times, each time with Opposer's consent because of Dushey's stated need for additional time to complete discovery. Once, discovery was extended for three months at the request of Dushey's former counsel. Once, discovery was extended for one month at the request of Dushey himself. Yet, during each of these extended periods Dushey has done nothing to fulfill his stated need for additional time to complete discovery. Dushey has not taken any further discovery, nor has he produced his documents, nor did he seek Opposer's deposition despite having all of Opposer's discovery responses in hand for over nine months. On the other hand, Tyr Sport has acted diligently in responding to and taking discovery.

Further, these delays are prejudicing Opposer. Tyr Water's marketing of bottled water under the name TYR, a famous name which consumers will associate exclusively with Opposer, is impairing Opposer's goodwill, by likely confusing purchasers and diluting and tarnishing Opposer's good name built up at great expense and effort and is in callous disregard of Opposer's rights.

Applicant has acted equally callously in regards to the Board's discovery orders in this case. Despite being given over four additional months to complete discovery, Applicant has failed to take or produce any additional discovery. Applicant should not be rewarded for its failure to act diligently.

Opposer requests that the Board deny this motion so that these cases can finally proceed directly to a final judgment.

Wherefore, Opposer respectfully requests that Marc Dushey's motion be denied.

Dated: March 26, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2012, a true and correct copy of the foregoing Opposition to Motion to Extend was served via U.S. First Class Mail, postage prepaid, upon the following:

Marc Dushey
1 State Street 21st Floor
New York, NY 10004

/Carla Calcagno/

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the above-referenced Opposition to Motion to Extend was deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to Commissioner for Trademarks P.O Box 1451, Alexandria, Virginia 22313-1451 on this 26th day of March 2012

/Carla Calcagno/